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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1955.

No.

JOSEPH A. BAXTER,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Joseph A. Baxter prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on July 12, 1955.

OPINION BELOW.

The opinion of the United States Court of Claims (App. p. 12) is reported in 129 C.Cls. 254.

JURISDICTION.

The judgment of the United States Court of Claims was entered July 12, 1955 (Tr. p. 25). A timely motion for rehearing was denied November 8, 1955 (Tr. p. 35). The jurisdiction of the Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED.

Whether by Section 12 of the Veterans' Preference Act of 1944 and the Civil Service Commission Retention Preference Regulations for Use in Reductions in Force, a veteran preference eligible is entitled to thirty days' advance written notice of separation by reduction in force.

STATUTE AND REGULATION PROVISIONS INVOLVED.

Veterans' Preference Act of 1944, Section 12 (Act of June 27, 1944, c. 287, Sect. 12, 58 Stat. 390, 5 U.S.C. 861):

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations * * *."

Veterans' Preference Act of 1944, Section 14 (Act of June 27, 1944, c. 287, Sect. 14, 58 Stat. 390, 5 U.S.C. 863):

> "No permanent or indefinite preference eligible * * * shall be discharged * * * except for such cause * * *

and the person whose discharge * * * is sought shall have at least thirty days' advance written notice * * *."

Civil Service Commission Retention Preference Regulations for Use in Reductions in Force dated November 3, 1944 (9 F.R. 13702):

"§12.310 Notice to employees. Each employee affected by a reduction in force shall be given an individual notice in writing at least thirty days before the action becomes effective. A statement of availability shall also be given to each employee who is to be separated or furloughed. Wherever possible, this notice shall be given thirty days before the employee is relieved from active duty, and the employee shall be continued in a pay status until his accrued annual leave is exhausted. Where there is insufficient work to continue the employee in an active duty status for thirty days, he shall have the greatest notice possible before he is relieved from active duty, and shall thereafter be carried in a pay status until his accrued leave is exhausted. If the period of active duty after notice is given and the period of accrued leave total less than thirty days, the employee shall be carried in a nonpay status for the remainder of the thirty day period * * *"

Civil Service Commission Retention Preference Regulations for Use in Reductions in Force, Sec. 20.10, dated May 1, 1947 (5 C.F.R., 1949 Ed., §20.10, 12 F.R. 2852):

"* * * Each employee affected by reduction in force shall be given an individual notice in writing at least 30 days before the action becomes effective * * *."

STATEMENT.

This action was instituted by petitioner, a veteran preference eligible employee, to recover salary.

Petitioner, an honorably discharged World War I veteran, was, in 1945, employed as a P-5 attorney under the classified civil service in the Madison Square Area office of the Manhattan District, War Department (Tr. p. 9). On March 2, 1945 he was given written notice of separation effective March 30, 1945 (Tr. p. 20). This separation was set aside by the Civil Service Commission because of nonconformance with Civil Service Commission retention preference regulations, and he was restored July 9, 1945 (Tr. p. 21). On July 9, 1945 he was given written notice of separation effective July 9, 1945. That separation was set aside by the Civil Service Commission and the employing agency was again directed to restore petitioner to active duty in order that he might be given 30 days' notice of separation and he was so restored on July 20, 1945 (Tr. p. 22). On July 20, 1945 he was given written notice of separation effective August 18, 1945. The Civil Service Commission denied petitioner's appeal therefrom (Tr. p. 22). Petitioner remained unemployed from March 30, 1945 until September 3, 1946 when he was again employed by the War Department as a P-4 attorney in the New York Quartermaster Purchasing Office (Tr. p. 23).

Petitioner instituted this action in the United States Court of Claims to recover salary for the period March 30, 1945 to September 3, 1946. On July 13, 1954 the United States Court of Claims decided that the separation effective March 30, 1945 was ineffective by reason of nonconformance with the Civil Service Commission retention preference regulations, but that all separations, viz. the separations effective March 30, 1945, July 9, 1945 and August 18, 1945 were governed by Section 12 of the Vet-

erans' Preference Act of 1944, supra; that petitioner was entitled to thirty days' advance written notice of discharge under Section 14 but not of release by reduction in force action under Section 12 and was entitled to recover salary only for the period March 30 to July 9, 1945 (Tr. pp. 17, 18). Entry of judgment was suspended to await the filing of a report by the General Accounting Office (Tr. p. 23). Such report was filed and on July 12, 1945 the United States Court of Claims entered judgment in favor of petitioner in the amount of $1,406.66 (Tr. p. 25). Petitioner filed timely motion for rehearing upon the ground that the notices of reduction in force actions separating petitioner from his War Department position effective July 9, 1945 and August 18, 1945 did not constitute individual notices in writing given petitioner at least thirty days before such actions became effective as required by Civil Service Commission Retention Preference Regulations for Use in Reduction in Force, supra, issued under authority of the Veterans' Preference Act of 1944, supra, and that consequently such failures of notice constituted fatal procedural defects (Tr. p. 27). Such motion for rehearing was overruled November 8, 1955 (Tr. p. 35).

REASONS FOR GRANTING WRIT.

A. Whether a veteran preference eligible is entitled to thirty days' advance written notice of separation by reduction in force, is an important question of Federal law which should be decided by the Court.

The Court below stated that under Section 14 of the Veterans' Preference Act of 1944, supra, a veteran upon being separated by dismissal was entitled to thirty days' advance written notice (Tr. p. 17) but that a veteran was not entitled to thirty days' advance written notice when he was

separated by reduction in force action under Section 12 of the Veterans' Preference Act of 1944, supra (Tr. p. 18).

The Court below did not refer to Civil Service Commission Retention Preference Regulations for Use in Reductions in Force, supra, nor to the first sentence of §12.310 thereof which alone relates to advance written notice, the subsequent provisions thereof other than those as to contents of such notice, relating only to payroll status during the advance notice period. See *Taylor v. United States*, C.Cls. No. 50412, decided April 5, 1955.

A comparison of the advance notice provision of §12.310 of Civil Service Commission Retention Preference Regulations for Use in Reductions in Force, supra, with the advance notice provision of Section 14 of the Veterans' Preference Act of 1944, supra, shows that there is no substantial difference between them:

§12.310	Section 14
"Each employee affected by a reduction in force shall be given an individual notice in writing at least thirty days before the action becomes effective."	"* * * the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice * * *."

Since Section 14 is mandatory (*Stringer v. United States*, 117 C.Cls. 30, 49, 90 F.S. 375, 378) §12.310 is also mandatory. Thirty days' advance written notice was not given to petitioner. The notice of separation through reduction in force effective August 18, 1945 was dated July 20, 1945 and excluding the day of notice there remained 11 days in July and 18 days in August for a total of 29 days, or one short of the required 30 days: *Stringer v. United States*, 117 C.Cls. 30, 48, 90 F.S. 375, 378. Similarly the notice of July 9, 1945 was defective since the separation through reduction in force thereby was made effective the same day.

Such failures of notice constituted fatal procedural defects: *Blackmar v. United States,* 128 C.Cls. 693, 707, 120 F.S. 408, 416; *Stringer v. United States,* 117 C.Cls. 30, 52, 90 F.S. 375, 380. Undoubtedly §12.310 of the Civil Service Commission Retention Regulations for Use in Reductions in Force, supra, is valid: *United States v. Watkins,* 173 F.2d 599, 603 (CA 2); *Blackmar v. United States,* 128 C.Cls. 693, 702, 120 F.S. 408, 412.

The precise question here arising has not been considered by the Court although Section 12 of the Veterans' Preference Act of 1944, supra, relating to reductions in force has been before the Court in *Hilton v. Sullivan,* 334 U.S. 323 and in *Elder v. Brannan,* 341 U.S. 277.

In the *Hilton case* the Court decided that regulations of the Civil Service Commission applicable to reductions in force, establishing an order of priority for retention of veteran permanent employees, were valid.

In the *Elder case* the Court decided that regulations of the Civil Service Commission relating to reductions in force, according preference only to veterans with permanent appointments were valid and that temporary war service appointees were not entitled to preference over non-veteran appointees.

Reductions in force under Section 12 of the Veterans' Preference Act of 1944, supra, have been the subject of a number of reported decisions and new cases are constantly arising. The number of war veterans on the Federal payroll runs into the hundreds of thousands. Reductions in force are constantly occurring and this type of separation has been invoked in all Federal departments and agencies. Reduction in force actions affecting veterans have been the subject of litigation involving the Navy Department in *Hilton v. Sullivan,* supra; the Department of Agriculture in *Elder v. Brannan,* supra; the War Assets Administration in *Johnson v. War Assets Administration,* 171 F.2d 556 (CA 7); the War Department in *Ciaffone v. United States,* 126 C.Cls. 532; the Reconstruction Finance Corp. in *Langham v.*

Reconstruction Finance Corp., 107 F.S. 482 (M.D.Tenn.): the Department of the Interior in *Peck v. United States*, 114 C.Cls. 551, 86 F.S. 138; the Veterans Administration in *Farrell v. Moomau*, 85 F.S. 125 (N.D.Cal.); the United States Mint in *Ashley v. Ross*, 191 F.2d 655 (App.D.C.); the Office of Price Administration in *Blum v. United States*, 120 C.Cls. 232; the Department of State in *Casman v. Dulles*, 129 F.S. 428 (D.D.C.); and the Civil Aeronautics Administration in *Gaines v. United States*, 131 F.S. 925 (C.Cls.).

At present, Retention Preference Regulations for Use in Reductions in Force, dated May 1, 1947, Sec. 20.10 (5 C.F.R., 1949 Ed., §20.10, 12 F.R. 2852) continues in effect the same provision here involved, viz.: "§20.10 * * * *Each employee affected by reduction in force shall be given an individual notice in writing at least 30 days before the action becomes effective*". In consequence, the question here involved is a current and continuing one involving veteran preference eligibles presently employed or seeking future employment.

Whether a veteran preference eligible is entitled to thirty days' advance written notice of separation by reduction in force is an important question of Federal law which should be decided by the Court.

It is accordingly submitted that certiorari should issue.

B. Whether a veteran preference eligible is entitled to thirty days' advance written notice of separation through reduction in force, is the subject of confusion, and clarification by the Court is desirable.

The judicial declarations and decisions relating to advance written notice of separation by reduction in force are confusing.

In *Ashley v. Ross*, 191 F.2d 655 (App.D.C.), where the reduction in force notice of March 3, 1950 was of separation April 7, 1950, the Court of Appeals denied the veteran's con-

tention that the advance notice period must be in a pay status upon the ground that Section 12 of the Veterans' Preference Act of 1944, supra, did not so provide.

In *Fass v. Gray*, 197 F.2d 587 (App.D.C.), where the reduction in force notice of April 19, 1950 was of separation on May 18, 1950, the Court said p. 592:

> "This Court held in Ashley v. Ross (1951, 89 U.S.App.D.C. 339, 191 F.2d 655) that the provision for thirty days' notice in Section 14 of the Act, has no application to reductions in force. Reductions in force, the court said, are governed by Regulations of the Civil Service Commission under Section 12 of the Act. Appellant makes no point about notice under the Regulations. Hence we have no briefs or argument on that subject and make no ruling with respect to it."

This decision left undecided whether thirty days' advance written notice was required under the regulations governing reductions in force.

In *Ciaffone v. United States*, 126 C.Cls. 532, where the reduction in force notice of August 26, 1946 was of separation November 26, 1946 the Court stated in a footnote p. 538:

> "5 CFR 1945 Supp., §12.310, provides in pertinent part:
>
> §12.310 *Notice to Employees.* Each employee affected by a reduction in force shall be given an individual notice in writing at least thirty days before the action becomes effective * * *."

In *Riley v. United States*, 126 F.S. 214 (C.Cls.), where the plaintiff's averment was that he had received more than thirty days' advance written notice of separation through reduction in force, the Court said p. 215:

> "The petition states that plaintiff was employed in that division on May 18, 1947 on a basis of grade 8 with

> a salary of $3,021 per annum, but after two months in that division he was notified that his services would be terminated August 29, 1947. Under his own allegations, plaintiff was given the full 30-day notice, and if the procedure was regular, it is not our province to inquire into the question of whether he should have been employed or retained. Since in the absence of an allegation to the contrary it must be presumed that in terminating plaintiff's services on August 29, 1947, the regular notice was given and the prescribed procedure followed, plaintiff is not entitled to recover."

This opinion indicates that a "full 30-day notice" is required in reductions in force.

In *Leeds v. Rossell*, 101 F.S. 481 (S.D.N.Y.), where the reduction in force notice of September 10, 1951 was of separation October 10, 1951, the Court said, p. 483:

> "The provisions of 5 U.S.C.A. §863, which require the giving of at least 30 days advance written notice, stating the reasons in detail for any proposed action, and an opportunity to be heard before appeal to the Civil Service Commission, refer to a discharge for cause. They do not apply to separation from employment on account of reduction in force, which is governed by 5 U.S.C.A. §861, Ashley v. Ross, D.C.Cir., 1951, 191 F.2d 655."

Ashley v. Ross, supra, did not decide that thirty days' advance written notice is not required under Section 12 of the Veterans' Preference Act of 1944, supra. But *Leeds v. Rossell*, supra, announces the principle that in reductions in force thirty days' advance written notice need not be given. Now the Court below has ruled that under Section 12 of the Veterans' Preference Act of 1944, supra, thirty days' advance written notice is not required.

Thus the judicial declarations and decisions as to the necessity of 30-days' advance written notice of separation by

reduction in force, are confusing. Clarification by the Court of this question is desirable and certiorari should issue.

CONCLUSION.

The issue raised by petitioner is important. It concerns an important question of Federal law affecting veteran Federal employees, which should be decided by the Court. The judicial decisions and declarations thereon are confusing and clarification by the Court is desirable. It is submitted that certiorari should issue.

Respectfully submitted,

EDWIN J. McDERMOTT,
Counsel for Petitioner.

Appendix

IN THE
UNITED STATES COURT OF CLAIMS.

No. 49994.

(Decided July 13, 1954.)

JOSEPH A. BAXTER
v.
THE UNITED STATES.

MR. JOSEPH A. BAXTER, pro se.
MR. FRANCIS X. DALY, with whom was Mr. Assistant Attorney General WARREN E. BURGER, for the defendant.

OPINION.

JONES, Chief Judge, delivered the opinion of the court:

The plaintiff brought this action under the court's general jurisdiction to recover pay due him as a result of his

alleged illegal discharge from the Federal service. It has now come before the court on the merits.

Plaintiff, an honorably discharged veteran of World War I, has been a member of the New York bar since 1932. During 1944 and the early months of 1945 he was working as a P-5 attorney in the legal section of the Madison Square Area office of the Manhattan District, which was the unit in the War Department charged with the development of the atomic bomb. In this office there also worked two other civilian attorneys, both nonveterans, one in the grade of P-6 at the time of the incidents here in question, who was plaintiff's immediate supervisor, and one in the grade of P-4. Sometime during the latter part of plaintiff's employment in that office it became evident that the work was decreasing in volume and that soon only two lawyers would be needed to handle the load. Because his superiors felt that the plaintiff was less efficient than the P-4 attorney working with him, they determined to make the necessary cut in personnel by dropping the plaintiff.

On March 1, 1945, plaintiff received a letter headed "SUBJECT: Notice of Reduction in Force" informing him that, effective March 30, 1945, he would be "involuntarily separated from the service due to a necessary reduction in force." Plaintiff appealed this action on the part of the agency to the regional Civil Service office which found that plaintiff had not been accorded his rights under section 9 (c) of Departmental Circular No. 510[1] and ordered his reinstatement. Plaintiff was restored on July 9, 1945, and on that same day received a letter headed "SUBJECT: Furlough", whereby he was notified that "due to the abolishment of your position as Attorney, P-5, you will be placed in furlough status for 90 days effective at the close of business this date." Plaintiff again appealed to the Civil Service authorities and they again ordered him restored on the ground that plaintiff did not receive a 30-day advance

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[1] Relevant parts of the text are set out in finding 4, **infra.**

notice as required by section 14 of the Veterans' Preference Act of 1944, 58 Stat. 387 (5 U. S. C. 851-869, 1946 Ed.). He was restored on July 20, 1945, and on that day was given a letter under the heading "SUBJECT: Furlough", which stated in the first paragraph

> 1. You are hereby notified that due to lack of work you will be placed in a furlough status for a period of one year effective at the expiration of all accrued annual leave to your credit. Your last active day of duty will be 18 August 1945. During the 30 day notice period you will be assigned to such work as this office may determine.

Plaintiff once more had recourse to the Civil Service Commission but this time without success. By letter of November 19, 1945, he was informed that "the retention preference regulations then in effect have been complied with by the U. S. Engineer Office and that your appeal is disapproved."

Plaintiff was unable to get a further reconsideration of his case by the Civil Service Commission. Except for the periods of reinstatement he remained out of work until September 3, 1946, when he was given a position as P-4 attorney in the New York Quartermaster Purchasing Office. He has been there ever since.

Plaintiff's efficiency ratings over the period in question varied. As of March 31, 1944, his rating was "good." A notice of efficiency rating of "unsatisfactory" as of March 31, 1945, was issued May 21, 1945. Plaintiff appealed this determination and, by decision dated October 29, 1945, it was changed to "fair".

Plaintiff's contention, in the main, is that the attempted dismissal of which he received notice on March 1, 1945, was defective under the ruling of the Civil Service Commission and that the two subsequent actions in regard to furlough were defective because they deprived him of his rights under section 14 of the Veterans' Preference Act, *supra*, specifically, the requirement for "at least thirty days' advance

written notice", and the right to a personal appearance on appeal to the Civil Service Commission. Defendant, in reply, contends that none of the notices here in issue were defective and that the action in each case was according to law.

We agree with plaintiff and the Civil Service Commission that the dismissal of which he was notified on March 1, 1945, was improper and that he is entitled to pay which he lost as a result until his restoration on July 9, 1945. As to the latter two actions we agree with defendant that they were proper since their legality must be judged primarily in the light of section 12 rather than section 14 of the Veterans' Preference Act.

Plaintiff contends that the last two personnel actions were for "furloughs" and as such governed by the provisions of section 14 of the act. It is true that section 14 specifically mentions "furloughed without pay" but that fact alone is not sufficient to prevent the application of section 12 where the personnel action is one pursuant to a reduction in force. Section 12 reads in part:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: * * * *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings. * * *

We think that an employee furloughed pursuant to a reduction in force has been "released" (or not "retained") within the meaning of section 12. We hold, furthermore, that plaintiff was furloughed in each case pursuant to a

reduction in force. The separation notice of March 1 explicitly stated that plaintiff's proposed separation was due to a reduction in force. The two furlough notices did not so state but it is clear from the evidence that the amount of work in plaintiff's section continued to drop throughout that year so that it became ever more imperative to reduce the total number of personnel. In fact, by the end of 1945 plaintiff's supervisor, the P-6 attorney, also left because he felt it was no longer necessary for him to be there.

Since plaintiff was furloughed pursuant to a reduction in force the agency is governed primarily by the provisions of section 12 in executing this personnel action. Plaintiff's efficiency rating at the time of the furlough notices was "unsatisfactory" but it was later changed to "fair." There is, however, no evidence in the record to indicate that the other two lawyers in plaintiff's office had anything but an efficiency rating of "good" or better. We may assume, *arguendo*, that they and plaintiff were "competing employees." Still under section 12, plaintiff, who had an efficiency rating of "fair", had no right in a reduction in force to displace these two non-veteran attorneys when they had an efficiency rating of "good" or better. Moreover, there is no evidence nor did plaintiff attempt to prove that there were any other "competing employees" whom plaintiff would have been entitled to displace.

Nor can plaintiff fall back on section 14. He asserts a right to a 30-day notice and to an appearance on appeal to the Civil Service Commission. But he is not entitled to these rights when his furlough was pursuant to a reduction in force since section 14 relates primarily to dismissals, furloughs, etc., for cause. *Ashley v. Ross*, 191 F. 2d 655; *Laden v. Crosson*, 108 F. Supp. 240. As stated above, plaintiff's dismissal was not for cause but due to a reduction in force.

For these reasons plaintiff is entitled to recover only for the dismissal pursuant to the notice of March 1, 1945, *i. e.*, for the period March 30 to July 9, 1945. Entry of judgment is suspended to await the filing of a report by the General

Accounting Office showing the amount due plaintiff in accordance with this opinion.

It is so ordered.

LARAMORE, Judge; MADDEN, Judge; WHITAKER, Judge; and LITTLETON, Judge, concur.

FINDINGS OF FACT.

The court, having considered the evidence, the report of Commissioner W. Ney Evans, and the briefs and argument of counsel, makes findings of fact as follows:

1. Plaintiff is a citizen of the United States, an honorably discharged veteran of World War I, and a member of the bar of the state of New York.

2. During the period of four or five years from 1939 through 1943, plaintiff was engaged in clerical and administrative work, being employed, throughout most of the period, by the War Department. After a brief respite from Government employment in the fall of 1943, plaintiff was again employed by the War Department (United States Engineer Office, Manhattan District) as a head administrative assistant, CAF-12, and assigned, in January 1944, to the legal section of the Madison Square Area (of the Manhattan District) in New York. The work for which he was employed and to which he was assigned was legal work. His status was officially changed from a CAF-12 administrative position to that of an attorney, P-5, on June 1, 1944. On and after June 1, 1944, plaintiff held a permanent, classified (P-5), civil service position.

The legal section of the Madison Square Area had a small staff which, throughout most of 1944, was hard pressed by the volume of work assigned to it. Among the civilians on the legal staff in January 1944 were two lawyers other than plaintiff. One was a brilliant young law school graduate

who had joined the staff as a P-1 attorney in 1942. By January 1944 he was a P-5 attorney and civilian head of the section. The other lawyer had been assigned to a P-4 (attorney) position, which he retained at all times material to this recitation. Both of these lawyers were nonveterans and war service indefinite appointees.

Plaintiff was added to the staff of the legal section to do much the same kind of work that was being performed by the P-4 attorney. After several months the civilian head of the section concluded that plaintiff was unable to perform the work to his satisfaction and limited plaintiff's assignments to the simpler and routine tasks of the office.

When, early in 1945, the volume of work began to decline to the point where a reduction in force was contemplated, the civilian head of the section nominated plaintiff for severance in preference to the P-4 attorney. This suggestion was later underscored by the assignment to plaintiff of an efficiency rating of unsatisfactory (changed on appeal to fair). The volume of work continued to decline throughout 1945 so that by the end of the year only one attorney remained in the section.

3. The Notice of Reduction in Force which was addressed to plaintiff was dated March 1, 1945. It was given to the civilian section head who handed it to plaintiff on March 2. The notice contained the following:

> * * * 1. You are hereby notified that you will be involuntarily separated from the service due to a necessary reduction in force, due to the near completion of the job to which you have been assigned. Your active work status will terminate 30 March 1945.[2] * * *
>
> 6. If you feel that there has been a violation of your rights under military preference laws or the regulations of the Civil Service Commission, you may appeal * * * within 10 days after receipt of this notice.

[2] Sometime during the month of March a modification was issued changing this date to March 31.

4. Plaintiff appealed in due time. He believed then, and for some time thereafter, that his rights on the retention register were superior to those of the P-4 attorney. (The civilian section head had moved up to P-6 in the meantime.) The retention preference regulations of the Civil Service Commission then contained the following provision:[3]

> * * * Whenever a retention group A employee with a classified (competitive) civil-service status cannot be retained in his present position, he shall be given an opportunity for transfer or reassignment to a continuing position at the same geographical location, provided that there is available a position under the Civil Service Act and Rules, not occupied by a retention group A employee with a classified (competitive) civil-service status, which may reasonably be expected to continue for one year or more, which the retention group A employee is qualified to fill without undue interruption to the activity involved. * * *

In the course of plaintiff's appeal from the reduction-in-force notice issued March 1, and of subsequent appeals from later actions by his employer, as hereinafter noted, the Civil Service Commission sifted the actions of the employing agency in compliance with the regulation quoted above, and ultimately concluded that the terms of the regulation had been met. These conclusions of the Civil Service Commission are not now in issue in this case. The issue relates only to the legal sufficiency of the separation notices served on plaintiff by the employing agency.[4]

5. On June 22, 1945, the Regional Director, Second United

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[3] Department Circular No. 510, section 9 (c); §12.309 (c) 9 F. R. 13702, Nov. 16, 1944.

[4] The issue of bias and lack of good faith on the part of responsible officials of the employing agency was abandoned by plaintiff during the course of trial.

States Civil Service Region, wrote the Area Engineer of the Madison Square Area, advising:

> * * * we * * * disapprove the separation of Mr. Baxter by reduction in force. * * *
>
> Mr. Baxter was not granted the benefits to which he is entitled * * *. * * *
>
> Please restore Mr. Baxter to active duty in the position from which he was separated so that he may be given an opportunity for transfer or reassignment * * *.

Plaintiff was advised of this action by a letter of the same date.

6. On July 9, 1945, at the Madison Square Area office, plaintiff was handed a letter addressed to him which contained the following:

> Reference * * * Notice of Reduction in Force.
>
> * * * previous action * * * is rescinded and you will be returned to duty * * * effective this date. * * *

Plaintiff was asked to report to the Personnel Section, where he was handed a second letter, as follows:

> * * * You are hereby notified that due to the abolishment of your position as Attorney, P-5, you will be placed in a furlough status for 90 days effective at the close of business this date.
>
> * * * This action is taken since there are no positions other than those occupied by Group A employees, to which you can be transferred or reassigned which are reasonably expected to continue for a year or more. You will however be circularized throughout the War Department offices within this geographical locality in an effort to secure a transfer to another installation prior to the expiration of your furlough status.

7. Plaintiff appealed the furlough action to the Civil Service, and the employing agency was again directed to restore

him to active duty, in order that he might be given 30 days' notice of separation. He was again restored to active duty status on July 20, 1945, and on the same day was handed the following letter:

> * * * You are hereby notified that due to lack of work you will be placed in a furlough status for a period of one year effective at the expiration of all accrued annual leave to your credit. Your last active day of duty will be 18 August 1945. During the 30 day notice period you will be assigned to such work as this office may determine. * * *
>
> * * * the Civil Service regulations governing this action, retention register and records are available for your inspection * * *.
>
> * * * you may appeal * * * within ten days * * *.

Plaintiff did appeal, with the results noted in finding 4.[5] It does not appear from the evidence whether or not the Civil Service Commission considered the adequacy of the notice issued on July 20, directing that the last day of active duty would be August 18. Plaintiff's last day of active duty was August 18, 1945.

8. Plaintiff's efficiency ratings over the period in question varied. As of March 31, 1944, his rating was "good." A notice of efficiency rating of "unsatisfactory" as of March 31, 1945, was issued May 21, 1945. Plaintiff appealed this determination and, by decision dated October 29, 1945, it was changed to "fair." There is no showing in the record that the efficiency rating of the other two attorneys in the section was not "good" or better. Whatever inferences may be

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[5] The appeal was directed, properly, to the Second Region. It was denied on November 19, 1945, by the Regional Director. On November 21, 1945, plaintiff appealed the Regional Director's decision to the Civil Service Commission. No reply from the Commission is in evidence.

drawn from the evidence indicate that their performance was such as would have entitled them to a "good" or better efficiency rating. There is also no showing in the record that there were any other employees with efficiency ratings of "fair" or below to whose positions plaintiff might have had a claim.

9. On September 3, 1946, plaintiff was again employed by the War Department, and assigned to a position as P-4 attorney in the New York Quartermaster Purchasing Office. He continued to be so employed at the time of the trial of this action.

Between April 1, 1945, and September 2, 1946 (both dates inclusive), plaintiff was unemployed, and received no income, except for his restorations to duty, being for one day on July 9, 1945, and for the 30 days from July 20 to August 18, 1945 (both dates inclusive).

Plaintiff has been paid for his services through March 31, 1945, and for all annual leave accrued to that date, and for the periods of restoration to duty listed in the preceding paragraph.

If plaintiff is entitled as a matter of law to recover, the parties have agreed that the amount of his recovery shall be subject to computation by the General Accounting Office under standards prescribed by the court.

CONCLUSION OF LAW.

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover.

Entry of judgment is suspended pending the filing of a report by the General Accounting Office showing the exact amount due plaintiff in accordance with the foregoing opinion.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 542

JOSEPH A. BAXTER, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims, dated July 13, 1954 (Pet. 12–17), is reported at 129 C. Cls. 254.

JURISDICTION

The opinion and conclusion of law of the Court of Claims were entered on July 13, 1954 (Pet. 12, 22). The judgment was entered on July 12, 1955 (R. 25).[1] A motion for a new trial, filed on Au-

[1] The opinion of the Court of Claims, entered on July 13, 1954, concludes with the statement, "Entry of judgment is suspended to await the filing of a report by the General Accounting Office showing the amount due plaintiff in accord-

gust 1, 1955 (R. 27), was denied on November 8, 1955 (R. 35). The petition for a writ of certiorari was filed on November 28, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Petitioner, a civil service employee entitled to veterans preference, was discharged in July 1945 from his Government position in connection with a reduction in force. The question presented is whether he was entitled to thirty days' advance written notice—

(a) by virtue of the Veterans Preference Act of 1944; or

(b) by virtue of a Civil Service Regulation which was in effect in the Summer of 1945 but which was amended substantially in September 1945, and has since been repeatedly modified.

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ance with this opinion. It is so ordered." (Pet. 16–17.) Judgment was entered a year later, on July 12, 1955 (R. 25). In view of the wording of the opinion it is our understanding that the time within which to file a petition for a writ of certiorari need not be computed from the date of the interim order (July 13, 1954) but can be measured by the date of entry of the final judgment. See Memorandum for the United States in Response to Brief in Opposition, filed in *United States* v. *Tanner*, No. 280, October Term, 1955, pp. 3–10. However, since certiorari was denied in *Tanner*, 350 U. S. 842, without indication as to whether that petition, filed within 90 days of the entry of judgment after accounting, was timely, we feel obliged to present this potentially jurisdictional fact to the Court.

STATUTE AND REGULATION INVOLVED

1. Section 12 of the Veterans' Preference Act, 58 Stat. 390, 5 U. S. C. 861, provides:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings: *And provided further,* That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replaceing [sic] agency, or agencies, for employment in positions for which they are qualified, before such agency, or agen-

cies, shall appoint additional employees from any other source for such positions.

2. In July 1945, Section 14 of the Veterans' Preference Act, 58 Stat. 390, 5 U. S. C. 863, provided:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse deci-

sion of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of same to the appellant or to his designated representative: *Provided further,* That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 15 hereof.

3. In July 1945, Civil Service Regulation § 12.310, 9 F. R. 13702, provided:

Notice to employees. Each employee affected by a reduction in force shall be given an individual notice in writing at least thirty days before the action becomes effective. A statement of availability shall also be given to each employee who is to be separated or furloughed. Wherever possible, this notice shall be given thirty days before the employee is relieved from

active duty, and the employee shall be continued in a pay status until his accrued annual leave is exhausted. Where there is insufficient work to continue the employee in an active duty status for thirty days, he shall have the greatest notice possible before he is relieved from active duty, and shall thereafter be carried in a pay status until his accrued leave is exhausted. If the period of active duty after notice is given and the period of accrued leave total less than thirty days, the employee shall be carried in a nonpay status for the remainder of the thirty day period. Besides specifying the nature of the action and the date of termination of active duty, the notice shall inform the employee of:

(a) His right to be continued in a pay status until accrued leave is exhausted,

(b) The proper office of the organization where he may examine a copy of these regulations and inspect the retention register and records,

(c) His right to appeal the proposed action to the Commission (Washington employees to the central office and others to the appropriate regional or branch office) within ten days from the receipt of notice, and

(d) The procedure for exercising any restoration or reemployment-list rights he may have, and the channels (departmental and field) through which he may apply for other government employment.

STATEMENT

Petitioner is an honorably discharged veteran of World War I (Fdg. 1, Pet. 17). He acquired competitive civil service status in 1924 by passing an examination for the position of a Post Office Clerk, accepting an appointment as a substitute Post Office Clerk, and satisfactorily completing the required probationary period (R. 1). He resigned from the Post Office Department in the Fall of 1925 (R. 1). Since May 1932, petitioner has been a member of the Bar of the State of New York (Fdg. 1, Pet. 17).

In April 1939, petitioner was reinstated in the classified civil service as a Clerk, Grade CAF–2, in the War Department (R. 2). During the next four or five years he was engaged in clerical and administrative work; by the Fall of 1943 he had risen to the position of Head Administrative Assistant, Grade CAF–12 (Fdg. 2, Pet. 17).

In January 1944, petitioner was assigned to the legal section of the Madison Square Area of the Manhattan District, *i. e.*, the World War II atomic bomb project (Fdg. 2, Pet. 17). Since he performed legal tasks, his status was changed from the administrative rating of CAF–12 to the equivalent professional classification of P–5 (Fdg. 2, Pet. 17).

The legal section to which petitioner was assigned had a staff of three lawyers. They were the head of the section, a "brilliant young law

school graduate"[2] in the grade of P–5; a second attorney assigned to a P–4 position;[3] and petitioner (Fdg. 2, Pet. 17–18). Originally, petitioner was assigned to the same type of work as that performed by the P–4 attorney. After several months, however, the head of the section determined that petitioner was unable to perform this work satisfactorily and limited his tasks to those of a simple and routine nature (Fdg. 2, Pet. 18).

The workload of the legal unit which was very heavy in 1944 began to decline noticeably in 1945. A reduction in force became necessary and the head of the section decided that petitioner, as the least efficient of the three, had to be separated first (Fdg. 2, Pet. 18).[4]

On March 2, 1945, petitioner received a reduction in force notice dated March 1, and effective March 31, 1945 (Fdg. 3, Pet. 18, R. 6, Exh. A).[5] On appeal from this dismissal, the Civil Service Commission, on June 22, 1945, disapproved petitioner's separation, holding that he was not given all the benefits to which he was entitled and re-

[2] Fdg. 2, Pet. 17.

[3] These two attorneys were nonveterans and war indefinite service appointees (Fdg. 2, Pet. 18).

[4] Petitioner's efficiency rating for the period ending March 31, 1945, issued on May 21, 1945, was "unsatisfactory"; on appeal it was changed to "fair" (Fdg. 8, Pet. 21).

[5] The effective day of this notice, originally March 30, 1945, subsequently was changed to March 31, 1945 (Fdg. 3, fn. 2, Pet. 18).

quested his restoration to active duty "so that he may be given an opportunity for transfer or reassignment" (Fdgs. 4–5, Pet. 19–20).

In obedience to this ruling petitioner was returned to active duty on July 9, 1945. On the same day, however, he was notified that due to the abolishment of his position he would be placed on a furlough status for 90 days effective at the close of business of that day, and that efforts would be made to secure his transfer to another War Department installation within that locality (Fdg. 6, Pet. 20, R. 6, Exh. B).

Petitioner appealed from this action to the Civil Service Commission which again ruled that petitioner should be restored to active duty so that he might be given a thirty days' notice of separation (Fdg. 7, Pet. 20–21). Petitioner accordingly was restored to active duty on July 20, 1945, and on the same day received a notice that due to lack of work he would be placed in a furlough status for a period of one year effective at the expiration of all accrued leave to his credit and that petitioner's last day of active duty would be August 18, 1945 (Fdg. 7, Pet. 21, R. 6, Exh. C). Petitioner again appealed to the Civil Service Commission, but this time without success (Fdgs. 4, 7, Pet. 19, 21).

In September 1946, petitioner obtained another position with the War Department. He had to accept, however, the lower grade of P–4 (Fdg. 9, Pet. 22).

In April 1946, petitioner brought a suit for reinstatement in the District Court for the District of Columbia against the Civil Service Commission and Robert P. Patterson, then Secretary of War. This action, alleging that petitioner's veterans preference rights had been disregarded and that he had not been given a full thirty days' notice, was dismissed in January 1949 on the ground that petitioner had been accorded all the rights to which he was entitled by the pertinent statutes and regulations, see *Baxter* v. *Pace,* 193 F. 2d 20, 21 (C. A. D. C.). While the case was pending on appeal it was dismissed as abated against the defendant Robert P. Patterson,[6] and, since the Secretary of War was a necessary party, petitioner dismissed the appeal on the same day, *viz.,* April 29, 1949. Cf. *Baxter* v. *Pace, supra,* at 21.

Petitioner thereupon instituted a second action for reinstatement,[7] which again was dismissed. Cf. *Baxter* v. *Pace, supra,* at 22. On appeal, the Court of Appeals stated that on the merits petitioner's principal contentions appeared to have been answered adversely to him in recent authoritative decisions, including *Ashley* v. *Ross,* 191 F. 2d 655, holding that under Section 12 of

[6] Secretary Patterson had resigned as Secretary of War in 1947 and petitioner had failed to substitute his successor.

[7] *Baxter* v. *Gray,* U. S. D. C. for the District of Columbia, No. 34556. After Mr. Gray's resignation as Secretary of the Army, his successor Frank Pace, Jr., was substituted in his place. Cf. *Baxter* v. *Pace, supra,* at 21–22.

the Veterans' Preference Act a veteran discharged in connection with a reduction in force was not entitled to a thirty days' notice (*Baxter* v. *Pace, supra,* at 21). The court, however, preferred to base its affirmance on the ground that petitioner's suit for reinstatment was barred by laches. *Baxter* v. *Pace, supra,* at 21–23.

Baxter v. *Pace* was decided in October 1951. In January 1951, petitioner instituted the instant action for salary in the United States Court of Claims. His claim is that none of the three dismissals accorded him a full thirty days' notice (R. 3).[8] Petitioner asserts that, consequently, he never was validly discharged from his P–5 position and that he is entitled to the compensation of an attorney Grade P–5 from the time of his allegedly illegal separation until September 3, 1946, when he accepted the position of an attorney Grade P–4, and apparently also to the difference between the salaries of an attorney P–5 and an attorney P–4 for the subsequent time.

The Court of Claims agreed with petitioner that the dismissal notice of March 1, 1945, was invalid and awarded to him pay for the period from March 30, to July 9, 1945.[9] It determined, however, that the discharge notice of July 9, 1945,

[8] As we have shown (*supra*, p. 8), petitioner's original discharge, as amended, accorded him a full thirty days' notice (cf. Fdg. 3, Pet. 18).

[9] The Government has not sought review of this decision by the Court of Claims.

effectively separated him from his position. The holding was that petitioner, who was discharged as the result of a reduction in force, was not entitled to a thirty days' notice, because his rights were governed exclusively by Section 12 of the Veterans' Preference Act which, in contrast to Section 14, does not require such advance notice.

ARGUMENT

This is petitioner's third attempt to obtain judicial review of his dismissal from Government service more than ten years ago. While the two previous suits for reinstatement were dismissed on formal grounds, the courts in each of them indicated strongly that there was no merit to petitioner's complaints. The instant petition is limited to the question whether petitioner was entitled to a thirty days' notice either under the statute or under the then applicable regulation.[10]

[10] Even this issue is not squarely raised by the case. The first letter of dismissal as amended (*supra*, p. 8) gave petitioner thirty days' notice. The Civil Service Commission disapproved it and requested petitioner's reinstatement "so that he may be given an opportunity for transfer and reassignment". Petitioner was thereupon restored to active duty and his second dismissal gave effect to these reemployment rights. *Supra*, p. 9. The true question presented is thus of narrower scope, *viz*, whether having been restored to active duty for this limited purpose, petitioner was entitled to a second thirty days' notice, assuming *arguendo* that he was entitled to one in the first place. For the purposes of this brief in opposition, however, we do not stand on this refinement, since we agree with the court below that petitioner was not entitled to a thirty days' notice in any event.

1. Section 12 of the Veterans' Preference Act (*supra*, pp. 3–4), which governs the rights of veterans in a reduction in force, provides that in the case of such a reduction in personnel, employees shall be released in accordance with Civil Service Regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings. Congress specified that these regulations would have to include the following provisions in favor of veterans: (a) that the time spent in military service be credited to determine the total length of service; (b) that preference employees with an efficiency rating of "good" or better be retained in preference to all other competing employees; (c) that those with efficiency ratings below "good" be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings; and (d) for preferential treatment in the event of the transfer of functions from one agency to another one. Petitioner seeks to add to these statutory requirements another one which Congress has not included in Section 12, namely, the thirty days' advance notice provided for in Section 14 of the Act (*supra*, pp. 4–5) which deals with dismissals for cause.

The court below, relying upon *Ashley* v. *Ross*, 191 F. 2d 655, 656 (C. A. D. C.), rejected petitioner's contention. In *Ashley* v. *Ross*, *supra*, reaffirmed in *Fass* v. *Gray*, 197 F. 2d 587, 592 (C. A. D. C.), certiorari denied, 344 U. S. 839, the

Court of Appeals for the District of Columbia Circuit, confronted with the same argument, held that the thirty days' notice requirement contained in Section 14, governing discharges for cause, did not apply to separations occasioned by reductions in force which fall under Section 12. The court pointed out that when Congress spelled out the items the Commission had to include in its regulations it did not specify among them a thirty days' notice provision. It concluded that it could not (191 F. 2d at 656):

> * * * ascribe to Congress an intention that in reductions in force large numbers of employees must be retained on the public payroll in a pay status for at least thirty days before they are released, although there may be no work for them to do, no funds from which to pay them, or both.

The two courts most concerned with the employment rights of Federal employees—the Court of Appeals for the District of Columbia Circuit and the Court of Claims—are thus in accord on this reading of Section 12.

Their holding that Congress did not intend to grant veterans, confronted with a reduction in force, any greater protection than that specified in Section 12 is supported by the legislative history of the Act. During the hearings on the Veterans' Preference Act before the Senate Committee on Civil Service, Senator Byrd inquired of Civil Service Commissioner Flemming about the rights

of veterans in the expected postwar general reduction of personnel. The ensuing colloquy revealed that the privileges set forth in Section 12 were intended and understood to be exclusive.[11]

It follows that petitioner cannot base his claim on an alleged violation of the statute.[12]

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[11] "Senator BYRD. Suppose there was a general reduction of personnel in the Federal Government, which I think all of us realize sooner or later must occur. What preference will the veterans have as to the retention of jobs they may have?

Mr. FLEMMING. There are three points which must be kept in mind. First of all, under this bill regulations will be required to give due effect, among other things, to length of service and then the next proviso specifies that any time spent in the armed forces shall be considered in determining seniority. The next point is really the most important. It provides that a veteran who has an efficiency rating of good or better shall be retained in preference to a competing employee, that is, a veteran with an efficiency rating of good would be retained in preference to a nonveteran with an efficiency rating of excellent.

Finally when you get down below good, it provides that the veteran shall be retained in preference to the competing nonpreference employees who have equal or lower efficiency ratings.

Senator BYRD. I think that goes as far as you could go." [Hearings before the Committee on Civil Service, U. S. Senate, 78th Cong., 2d sess., on S. 1762 and H. R. 4115, p. 29.]

[12] Petitioner claims that the language of the Court of Claims in *Riley* v. *United States*, 130 C. Cls. 113, presupposes that even in a reduction in force a veteran is entitled to a thirty days' notice. The plaintiff in that case had been given more than thirty days' notice. Thus, the question whether he was entitled to such notice was not in issue, and the decision does not constitute a holding. Moreover, we submit that if the court should have felt that such a requirement existed, it was based upon the 1947 Regulations which are not involved here, and which were superseded in 1955, *infra*, p. 17.

2. Petitioner's alternative argument is that, if he is not entitled to thirty days' notice under the statute, the Civil Service Regulations conferred that right upon him. In support of his position he refers to the statement in *Fass* v. *Gray*, 197 F. 2d 587, 592 (C. A. D. C.), certiorari denied, 344 U. S. 839, that the court was not making any ruling with respect to the veterans' rights under the [1947] Civil Service Regulation.

Regulation 12.310, *supra*, pp. 5–6, which governed the notice to be given in July 1945 to an employee affected by a reduction in force, required thirty days' notice only where there was sufficient work to continue the employee in active duty for that period of time. While the first sentence of Regulation 12.310 sets forth the general rule that employees should be given thirty days' notice, the third and fourth sentences modify this requirement by stating that this notice should be given "wherever possible * * * thirty days before the employee is relieved from active duty," and that "where there is insufficient work to continue the employee in an active duty status for thirty days, he shall have the greatest notice possible before he is relieved from active duty * * *."[13] Since

[13] Petitioner, relying on *Taylor* v. *United States*, 131 C. Cls. 387, reads Section 12.310 as if the first sentence provided for thirty days' notice while the subsequent portions deal with the employee's payroll status during the notice period (cf. Pet. 6). *Taylor*, however, did not involve a reduction in force under Section 12.310, but a dismissal for cause under Section 22.2 of the 1947 Regulations.

petitioner's position had been abolished prior to July 9, 1945, and there was therefore no work for him to do, the furlough notice received by him on that day (*supra*, p. 9) complied fully with the requirements of Regulation 12.310.

In any event, petitioner's argument claiming that he was entitled to thirty days' notice under Regulation 12.310, as it existed in July 1945, does not raise any issue of general importance. Regulation 12.310 was substantially amended in September 1945 (10 F. R. 12185),[14] again in January 1947 (12 F. R. 60, 96), and in March 1947 (12 F. R. 1883). In May 1947 it was redesignated § 20.10 (12 F. R. 2849). The current provisions, again substantially changed, may be found in 5 C. F. R. (1955 Pocket Supplement) 20.6. This case thus involves the interpretation of regulations which were superseded more than ten years ago, and it is unlikely, indeed, almost impossible, that any further litigation involving this particular language will ever reach the courts. For an action for reinstatement based on a reduction in force prior to September 1945, or even 1947, has been barred by laches for many years. *Arant* v. *Lane*, 249 U. S. 367; *Caswell* v. *Morgenthau*, 98 F. 2d 296 (C. A. D. C.), certiorari denied, 305 U. S. 596; *Sawyer* v. *Stevens*, 221 F. 2d 822 (C. A. D. C.), certiorari denied, 348

[14] The September 1945 amendment dropped the crucial third sentence, discussed, *supra*, p. 16, that the employee be given thirty days' notice *wherever possible*.

U. S. 959. Similarly, the six years statute of limitation has run for many years against any analogous action to recover pay or compensation.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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